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CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1933.

No.

GEORGE W. McCANDLESS, as Receiver of Duquesne Gas Corporation,
Petitioner (Complainant-Appellee-Appellant Below),

—against—

MAXIME H. FURLAUD and KINGSTON CORPORATION,
Defendants-Appellants-Appellees Below,

and

BYRON CORPORATION and CHAUCER CORPORATION,
Defendants-Appellees Below,

and

CARLOS REUTER,
Defendant Below.

BRIEF OF APPELLEES IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

LOUIS B. EPPSTEIN,
IRA W. HIRSHFIELD, and
LOUIS J. ALTKRUG,
Of Counsel.

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and

CARLOS REUTER,
Defendant Below.

BRIEF OF APPELLEES IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

This brief is submitted in opposition to a petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit, presented by complainant in the court below.

The United States Circuit Court of Appeals for the Second Circuit reversed a decree entered by the United States District Court for the Southern Dis-

trict of New York in favor of complainant and based its reversal solely on the ground that the petitioner did not have title to the cause of action sued on.

Statement.

I.

Concerning the Facts.

Since the Circuit Court of Appeals for the Second Circuit deemed it unnecessary to pass upon the facts involved in the alleged cause of action, we assume that this Court, under its well-established practice, will not do so. Nevertheless, we find it necessary briefly to state the actual facts as proven in order that we may not be prejudiced by the erroneous conclusions which the petitioner has drawn therefrom and which he has set up as the facts of this case.

The actual facts are:

A. Maxime H. Furlaud and Carlos Reuter were stockholders and executive officers of a corporation at that time known as Furlaud & Company, Inc.

B. Kingston Corporation was a wholly owned subsidiary of Furlaud & Company, Inc. (fol. 954).

C. Kingston Corporation acquired options upon certain properties in Pennsylvania and also owned certain other properties outright, all of which were acquired with funds furnished by Furlaud & Company, Inc. (fols. 228-234, 246-250, 349-352).

D. Furlaud & Company, Inc. next caused Duquesne Gas Corporation to be incorporated, and ac-

quired all of its originally issued stock (fols. 158-159, 369, 885-891).

E. Furlaud & Company, Inc. caused Kingston Corporation to transfer to Duquesne Gas Corporation its properties and options in consideration of Duquesne Gas Corporation assuming an obligation of Kingston Corporation and delivering to Kingston Corporation certain bonds and stock of Duquesne Gas Corporation (fols. 354-356, 362-363, 868-878).

At the time of this transaction Furlaud & Company, Inc. was the only stockholder of Duquesne Gas Corporation.

F. Furlaud & Company, Inc. subscribed for all of the remaining unissued stock, bonds, and notes of Duquesne Gas Corporation and paid for them with funds borrowed for that purpose (fols. 349-355, 485-488, 946-950).

No person, other than Furlaud & Company, Inc. and its wholly owned subsidiary, Kingston Corporation, ever acquired a share of stock, or a bond, or a note directly from Duquesne Gas Corporation (fols. 487-489).

G. Prior to actually taking over the properties, Furlaud & Company, Inc. organized two selling groups and offered the Duquesne Gas Corporation bonds to the public when, as, and if issued (fols. 320, 506-527, 763-771).

H. It issued circulars which contained quotations from a letter written by the Vice President of Duquesne Gas Corporation, addressed to Furlaud & Company, Inc. which, among other things, stated:

> "These bonds are issued by the Corporation in connection with the acquisition of properties and to provide cash for developments, ex-

tensions and other corporate purposes" (fol. 809).

The circulars stated that the foregoing was "quoted from a letter from the Vice President of the Corporation to the Bankers" (fols. 792, 830).

I. Subscriptions addressed to Furlaud & Company, Inc. for the purchase of bonds were received by Furlaud & Company, Inc. in large amounts and it proceeded to close the deal (fols. 493, 539, 542, 771-772).

J. Every check received from these subscribers was made payable to Furlaud & Company, Inc. and, as received, was used in paying off the loans made by Furlaud & Company, Inc. (fols. 486-497, 531, 539, 542).

K. Many of these checks were received on the actual date of closing (fols. 539, 542).

A.

The complainant contends that as a result of the foregoing representation in the offering circular all the monies received from the sale of these securities by Furlaud & Company, Inc. were delivered to it in trust and that Duquesne Gas Corporation acquired a property right in such funds.

B.

The defendants contend that as a result of these transactions no injury of any kind did or could have resulted to Duquesne Gas Corporation and that if any misrepresentations were made to any purchaser of bonds, or notes, or stock to his damage, he, and he alone, had a personal cause of action as a result thereof.

Mr. Justice Holmes in the case of *Old Dominion Copper Co.* v. *Lewisohn,* 210 U. S. 206, at page 212, says:

> "At the time of the sale to the plaintiff, then, there was no wrong done to anyone. Bigelow, Lewisohn, and their syndicate were on both sides of the bargain, and they might issue to themselves as much stock in their corporation as they liked in exchange for their conveyance of their land. * * * *If there was a wrong, it was when the innocent public subscribed. But what one would expect to find, if a wrong happened then, would not be that the sale became a breach of duty to the corporation nunc pro tunc, but that the invitation to the public without disclosure, when acted upon, became a fraud upon the subscribers from an equitable point of view, accompanied by what they might treat as damage. For it is only by virtue of the innocent subscribers' position and the promoter's invitation that the corporation has any pretense for a standing in court. If the promoters, after starting their scheme, had sold their stock before any subscriptions were taken, and then the purchasers of their stock, with notice, had invited the public to come in, and it did, we do not see how the company could maintain this suit. If it could not then, we do not see how it can now."* (Italics ours.)

II.

Concerning the Proceedings.

The statement contained in the petition for a writ of certiorari regarding the appointment of Mr. Mc-

Candless as a Chancery Receiver by the United States District Court for the Western District of Pennsylvania is correct.

Petitioner's statement concerning the *ex parte* proceedings taken by Mr. McCandless in the United States District Court for the Southern District of New York to have himself appointed ancillary receiver of the Duquesne Gas Corporation is also correct. We desire, however, to call the Court's attention to the fact that in the Southern District of New York, no bill of complaint was filed against the Duquesne Gas Corporation by a judgment creditor, no answer was interposed by the Duquesne Gas Corporation,—in short, there was no suit pending in that Court at the time that Mr. McCandless was appointed Ancillary Receiver.

The statement at page 3 of the petition for a writ that "upon the appeal the defendants Maxime H. Furlaud and Kingston Corporation raised for the first time the question of the complainant's title to sue" is not correct.

Complainant, in paragraph "Fourth" of his amended bill of complaint, alleged that "upon petition of the complainant * * * an order was duly made on the 23rd day of March, 1932, by the said last mentioned Court appointing said complainant, George W. McCandless, as Ancillary Receiver of Duquesne Gas Corporation, which last mentioned order duly authorized the complainant, as such Receiver, to bring this suit * * *" (fols. 18-19).

Defendants, in paragraph "3" of their answers, alleged: "With respect to the allegation of paragraph 'Fourth' of the amended bill of complaint, defendant denies having information sufficient to form a belief with respect thereto and leaves the complainant to his proof thereof" (fols. 135, 156, 177, 198).

That this denial properly raised the issue in the lower Court is settled by the decision of this Court in *Grant* v. *Leach & Co.,* 280 U. S. 351.

See also *Homer* v. *Burr Pumping Engine Co.,* 180 Mass. 163.

Questions Involved in the Petition.

Stripped of verbiage, the contention of the Petitioner is as follows:

1. That the doctrine announced in the case of *Booth* v. *Clark,* 17 How. 322, 15 L. Ed. 164, is obsolete; that the case was decided in 1855; that many changes have occurred in the relations existing between our various States since then and that the rule there announced should now be discarded.

2. That the decision of this Court in the case of *Old Dominion Copper Co.* v. *Lewisohn,* 210 U. S. 206 and that of the Circuit Court of Appeals for the Second Circuit in the case of *Ball* v. *Breed,* 294 Fed. 227, upon which this Court refused to grant a writ of certiorari (264 U. S. 584), should be revised.

We contend:

1. Although the case of *Booth* v. *Clark* was decided in 1855, the rule therein expressed has been so often affirmed and reaffirmed by this Court that it is now the well settled law of the land.

See for example:

Great Western Min. & Mfg. Co. v. *Harris,* 198 U. S. 561;

Sterrett v. *Second Nat. Bank,* 248 U. S. 73;

Oakes v. *Lake,* 78 L. Ed. (Adv. Ops.) 15;
Moore v. *Mitchell,* 281 U. S. 18;
Hale v. *Allinson,* 188 U. S. 56;
Grant v. *Leach & Co.,* 280 U. S. 351;
Porter v. *Sabin,* 149 U. S. 473;
Bank of Bethel v. *Pahquioque Bank,* 14 Wall. 383;
Atlantic Trust Co. v. *Chapman,* 208 U. S. 360;
Converse v. *Hamilton,* 224 U. S. 243;
Bernheimer v. *Converse,* 206 U. S. 516.

As late as November 6, 1933, in the case of *Oakes* v. *Lake,* 78 L. Ed. (Adv. Ops.) 15, this Court in an opinion written by Mr. Justice Sutherland, says (p. 17):

> "The general rule *undoubtedly* is that an ordinary chancery receiver, having no other authority than that arising from his appointment as such, cannot as of right maintain an action in a state other than that in which he was appointed. *The decision in Booth* v. *Clark,* 17 How. 322, 15 L. Ed. 164, *to that effect has been uniformly followed by this court.*" (Italics ours.)

In *Sterrett* v. *Second Nat. Bank,* 248 U. S. 73, this Court after saying (p. 76):

> "Since the decision of this Court in *Booth* v. *Clark,* 17 How. 322, 15 L. Ed. 164, it is the settled doctrine in Federal jurisprudence that a chancery receiver has no authority to sue in the courts of a foreign jurisdiction to recover demands or property therein situated."

and after some further discussion of the rule says (p. 77):

> "The system established in *Booth* v. *Clark*

> has become the settled law of the Federal courts, and if the powers of chancery receivers are to be enlarged in such wise as to give them authority to sue beyond the jurisdiction of the appointing court, such extension of authority must come from legislation, and not from judicial action."

In the face of this unbroken line of decisions, we can see no merit in the statement contained in the Conclusion of the petition for a writ to the effect that

> "It is most important * * * for the Court also to give consideration to the wisdom of continuing a rule of policy laid down in *Booth* v. *Clark* under which comity has been denied to equity receivers to sue in a jurisdiction beyond that of their appointment."

Nor can we agree with petitioner's statement of the effect of these decisions. They do not deny comity to any one having a cause of action or having a right of property to sue anywhere in the United States. They merely announce and reiterate the very clear proposition of law that a mere federal chancery receiver, having no title other than that which arises from his appointment as such, has no power of action and has no right, title, or interest in property beyond the jurisdiction of the Court appointing him.

Moreover, in connection with the statement of this Court in the *Sterrett* case, *supra,* that if the powers of chancery receivers are to be enlarged in such wise as to give them authority to sue beyond the jurisdiction of the appointing court, such extension of authority must come from legislation and not from judicial action, it seems pertinent to call attention to the fact that at least two efforts have been made to cause Congress to enlarge the powers of chancery receivers in the manner suggested.

In Section 56 of the Judicial Code, 36 Stat. 1102, 28 U. S. C. A. 117, Congress has provided a method by which the powers of federal receivers might be extended where land, or other property of a fixed character, lies within different states in the same judicial circuit in which the receiver is appointed. However, even in this act, Congress has very carefully pointed out the exact procedure to be followed before a receiver may obtain this very limited extension of power.

In the 2nd Session of the 71st Congress, several bills were introduced (H. R. 9,997, 9,998, 9,999 and 10,000) the purpose of which was to grant extraterritorial powers to equity receivers in all of the judicial circuits of the United States. At the hearings before the Committee on the Judiciary of the House of Representatives, the question of whether this result could be accomplished by changes in the Federal Equity Rules by the United States Supreme Court was discussed. It was there asserted that the question was one of jurisdiction, that jurisdiction could not be vested in courts by an equity rule, and that Congress alone had the power to act in this matter (Hearings before the Committee on the Judiciary, House of Representatives, 71st Congress, 2nd Session, on H. R. 9,997, 9,998, 9,999 and 10,000, p. 13). Congress failed to grant this power.

Petitioner in his brief next refers to two cases decided by this Court wherein certain receivers of corporations who were appointed by State courts and who were clothed with title to all of the property of the corporations wherever located were permitted to sue in foreign jurisdictions, namely, *Bernheimer* v. *Converse,* 206 U. S. 516, 51 L. Ed. 1163, 27 S. C. 755 (1907), and *Converse* v. *Hamilton,* 224 U. S. 243, 56 L. Ed. 749, 32 S. C. 415 (1911).

In both of these cases the rule, laid down in *Booth* v. *Clark,* was reiterated and reaffirmed.

This Court pointed out that the receivers in those cases were not mere chancery receivers (such as petitioner in this case is), but much more. They were appointed by State courts and under the laws of the States of their appointment they became *quasi assignees,* vested with the rights of creditors against the stockholders and charged with the enforcement of those rights in the Courts of the State and elsewhere; and the right to maintain an action in another State under these circumstances could not be denied without violating the full faith and credit clause of the Constitution.

In the case of *Oakes* v. *Lake,* 78 L. Ed. (Adv. Ops.) 15, the Court says, in referring to *Converse* v. *Hamilton, supra,* as follows (p. 17):

> "In the case just dealt with, and in other cases where the receivership property has been assigned to the receiver by its owner, the suit is brought not strictly in his capacity as receiver, by virtue of his appointment in another state, but in his capacity as assignee. High, Receivers, 4th ed. § 244. His designation as receiver, etc. in the title of the cause may be regarded as *descriptio personae* merely."

In this case, there is no such question presented. Mr. McCandless was a mere federal chancery receiver and he neither had nor did he claim that he had title to these demands by conveyance or by statute. Except for his appointment as Receiver by the United States District Court for the Western District of Pennsylvania, he had no power of any kind,

no right, title or interest in or to any of the property of Duquesne Gas Corporation and he claimed none. He was a mere federal chancery receiver and nothing more.

Petitioner's contention that even if this receiver had no power to bring an action in his official capacity in this jurisdiction, he still might have the power to institute an *ex parte* proceeding here and have himself appointed ancillary receiver, has been negatived by an unbroken line of decisions and authorities.

Greene v. *Star Cash & Package Car Co.*, 99 Fed. 656;
In re Brant, 96 Fed. 257;
Walker v. *United States Light & Heating Co.*, 220 Fed. 393, at 395;
Fairview Fluor Spar & Lead Co. v. *Ulrich*, 192 Fed. 894;
Pressley v. *Harrison*, 102 Ind. 19;
Baker v. *Backus' Adm'r*, 32 Ill. 96;
Bank v. *Circuit Judge*, 43 Mich. 296;
Jones v. *Schall*, 45 Mich. 380;
Mercantile Trust Co. v. *Kanawha & O. Ry. Co.*, 39 Fed. 337;
2 Beach, Mod. Eq. Prac., Section 721;
2 Daniell, Ch. Pl. & Prac. (6th Ed.), page 1734;
3 Street "Federal Equity Practice", Sections 2542, 2694-2695;
C. W. Wickersham, "Primary and Ancillary Receiverships", 14 Virginia Law Review 599, 601.

The very petition that he filed before the District Court for the Southern District of New York estab-

lished the fact that he had no interest in any subject matter which might be involved in that proceeding. There was nothing upon which the jurisdiction of the District Court for the Southern District of New York could attach. There was no aggrieved party plaintiff before that Court. There was no defendant before that Court. There was nothing before the Court over which it had jurisdiction.

None of the cases cited by the petitioner are in conflict with our views.

In the case of *Rust* v. *United Waterworks Co.*, 70 Fed. 129, Rust was the receiver of a corporation appointed by a court of a State under a law which provided that such receiver should succeed to its property, and to the right to act for the corporation. He was not a mere chancery receiver. He was a *quasi assignee* with title to its property wherever situated. His right to bring that suit as assignee could not be questioned. His designation of himself as receiver in the title of the cause is regarded as *descriptio personae* merely. This decision is in harmony with the decision of this Court in *Oakes* v. *Lake, supra,* and the cases there cited.

In the case of *Bluefields S. S. Co.* v. *Steele,* 184 Fed. 584, a bill was filed by a creditor and not by a foreign receiver, and the defendant corporation had entered its appearance.

Walker v. *United States Light & Heating Co.,* 220 Fed. 393, merely holds that a corporation having once consented to the appointment of a receiver upon the application of a simple contract creditor could not, upon the application of a simple contract creditor in another court for the appointment of an ancillary receiver, object solely on the ground that the

petitioner was not a judgment creditor. The Court, in that case, was very careful to point out the absolute necessity of the filing of a bill by a proper complainant.

No case has been cited by the petitioner, and we have been unable to find a single case decided by any Court in the United States of America, in which the appointment of an ancillary receiver upon the application of a mere foreign federal chancery receiver has been upheld.

2. The second question raised by the petitioner is that the cases of *Ball* v. *Breed,* and *Old Dominion Copper Co.* v. *Lewisohn, supra,* should now be reversed or modified.

The doctrine laid down in these cases has been recognized in the decisions of many courts.

See:

Blum v. *Whitney,* 185 N. Y. 232;
Tompkins v. *Sperry, Jones & Co.,* 96 Md. 560;
Mile Wide Copper Co. v. *Piper,* 29 Ariz. 129;
Turner v. *Markham,* 155 Cal. 562;
Hamilton v. *Hamilton Mammoth Mines,* 110 Or. 546;
Higgins v. *Lansingh,* 154 Ill. 301;
Hoffman Motor Truck Co. v. *Erickson,* 124 Minn. 279.

It is the settled law of the land. We do not feel justified in further discussing the question of the applicability of the rule of the *Lewisohn* case to the facts of the case at bar for the reason that the Cir-

cuit Court of Appeals did not deem it necessary to consider or pass upon those facts which were at issue in that Court, and we assume that they will, therefore, not be considered by this Court on this application.

Grant v. *Leach & Co.,* 280 U. S. 351, at page 363;
Buzynski v. *Luckenbach S. S. Co.,* 277 U. S. 226, at page 228;
Brown v. *Fletcher,* 237 U. S. 583.

Conclusion.

In conclusion we insist that there are no special or important reasons which would justify a review of this case on writ of certiorari. Nor does this case come within any of the character of reasons which the United States Supreme Court has specified as furnishing grounds for the granting of a writ (Rule XXXVIII of the General Rules of the United States Supreme Court).

It is not a case where the Circuit Court of Appeals has rendered a decision in conflict with the decision of another Circuit Court of Appeals on the same matter. Upon the questions here involved the decisions of the Circuit Courts of Appeals are uniformly in harmony with the decision rendered in this case.

It is not a case in which a Circuit Court of Appeals has decided an important question of local law in a way probably in conflict with applicable local decisions; or has decided an important question of general law in a way probably untenable or in conflict with the weight of authority; or has decided an important question of federal law which has not been settled

by this Court; or has decided a federal question in a way probably in conflict with applicable decisions of this Court; or has so far departed from the accepted and usual course of judicial proceedings, or has so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

On the contrary, every question involved in this petition has been definitely passed upon by this Court as well as by a number of the Circuit Courts of Appeals in the United States.

There is no conflict in these decisions.

The actual purpose of this application is to cause this Court to give consideration to the wisdom of changing the rule laid down by it in *Booth* v. *Clark,* and so often approved and reaffirmed by it.

In view of the very explicit statement of this Court in *Sterrett* v. *Second Nat. Bank, supra,* that "if the powers of chancery receivers are to be enlarged in such wise as to give them authority to sue beyond the jurisdiction of the appointing Court, such extension of authority must come from legislation, and not from judicial action", we respectfully submit that this Court has decided that it has no power to change that rule.

It is true that in the petition it is also suggested that this Court should review its decision in *Old Dominion Copper Co.* v. *Lewisohn,* and determine its applicability to the facts of this case. The decision of the Circuit Court of Appeals, however, was based solely on the proposition that this complainant had no title to any cause of action in the

jurisdiction where the suit was brought and the bill was dismissed for that reason alone.

The Circuit Court of Appeals expressly stated that it need not now decide whether the transactions testified to resulted in a misappropriation of funds or a legitimate profit.

Unless therefore this Court should see fit not only to reverse the rule announced in the case of *Booth* v. *Clark* and in the many cases reaffirming that rule, but should also see fit to change its rule of practice to the effect that it will not in the first instance review questions of fact not passed upon by the Circuit Court of Appeals, we do not believe it will consider the further question presented by the petition that this Court should also reverse the rule announced in the case of *Old Dominion Copper Co.* v. *Lewisohn.*

We respectfully submit that in view of the fact that this petitioner was admittedly a mere federal equity receiver without title of any kind to property or demands located outside of the jurisdiction of his appointment, there is nothing before this Court which justifies the granting of a writ of certiorari.

We therefore respectfully submit that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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LOUIS J. ALTKRUG,
Of Counsel.